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IN THE

Supreme Court of the United States.

~~October Term, 1904.~~

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No. 72.

ALLEN C. CLARK, SARAH P. CLARK, HIS WIFE, AND BARTOW L. WALKER,
Appellants
vs.
JOHN E. ROLLER,
Intervenor.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

Statement of Case.

As appears from the record, on January 14, 1893, the appellants, Allen C. Clark and wife, filed a suit in the Supreme Court of the District of Columbia, Equity Cause No. 14,468, for partition of Lots 8, 9 and 10 in Square 1028, situate in the City of Washington (Rec., p.

81). By the bill they set forth that they claimed title to same by mesne conveyance, through one, Abraham Young, who was seized and possessed of said property in the year 1800. There were many defendants to the bill, including the heirs-at-law of James Ward Scott, who it was alleged owned one-fifth interest, acquired from one of the heirs of said Young.

John E. Roller, appellee, was made defendant, it being alleged that he claimed title to the whole of the property under a tax sale of 1852. It was alleged by said bill that the tax sale and all proceedings therein were null and void, because the requirements of the law had not been complied with in making such sale (Rec., p. 87). (See par. 17 of bill.) By said bill it was further alleged that the claim of John E. Roller was a cloud upon the title of the complainants and ought to be removed, and a decree was prayed accordingly.

Roller demurred to the bill on two grounds: 1st, that the bill could not be maintained until the complainants' title had been settled at law; and 2d, that the complainants were guilty of laches (Rec., p. 79).

The cause was heard on said demurrer and the bill dismissed as to Roller only (Rec. p. 79). Thereupon the complainant, Clark, voluntarily entered his bill dismissed (Rec., p. 78). And on November 24, 1898, filed the new bill, equity cause No. 15,141, the original bill in this case (Rec., p. 2.) Said new bill contains substantially the same allegations as the former bill, and had the same parties, excepting said Roller and one Ledina Hoglen, who in the meantime had conveyed her interest to the defendant, Walker.

Thereupon, Roller obtained leave to intervene in the new suit (Rec., p. 9).

And filed an answer to the said original bill (Rec., p. 10). By said answer Roller admitted all of paragraphs 2 to 15 of said second bill, which paragraphs set forth the relationship of the parties to said young, deaths of their ancestors and traced title to the complainants and defendants to the bill other than said Roller. In answering the 16th paragraph of the second bill, which will be found on page 7, which sets forth that the complainants and the defendants to the bill, were entitled to have partition of the land by sale, Roller said, Rec., p. 10: "This respondent further admits that if the allegations in the bill be sustained and the contentions of this respondent overturned, then the statement made in paragraph 16, so far as he is informed and believes, is true."

The said answer of Roller further set forth that he claimed title under a tax sale made in April, 1852: payment of taxes by himself and those under whom he claimed, etc. He further charged unexplained laches: and finally set up the dismissal of the former suit as a bar (Rec., p. 9).

After Roller was admitted the second time as defendant, the appellant, Clark, filed a supplemental petition repeating practically the same allegations concerning the legality of Roller's title as in the bill as first filed (Rec., p. 13).

And to this supplemental bill, Roller pleaded the former decree sustaining his demurrer (Rec., p. 19). Notwithstanding, that Roller had admitted all the allegations in relation to the heirship, in tracing title, the complainant took proof sufficient to give the Court power to render a decree; none of said testimony, however, is contained in the record. Said Roller by stipulation in the case (Rec.,

p. 29) admitted that the title of which Abraham Young and John Young died seized, was vested in the parties, complainants and defendants, excepting said Roller. The deposition of the appellant, Bartow L. Walker (Rec., p. 16), tended to show that he purchased the undivided interest he held to the land in question of a person who was then in actual possession and his checks show what he paid for same (Rec., pp. 27, 28). The appellee, Roller, then took testimony in his own behalf (Rec., pp. 39 to 72). He personally testified that he purchased the property, then vacant lots in 1887: that he paid taxes and assessments against same; that he caused the erection of a fence and leased the same to one Myers, and in 1892 he discovered the fence had been torn down, and earth dumped on the lots. That some one else, whom he supposes to be one John H. Walter, had put up a fence around same.

Witness, Mr. Myers (Rec., p. 72), testified that the lots were fenced in 1887, and he kept his horse there until 1892, and in that year the fence was carried away and burned, and in the fall of the same year a man by the name of Davis, who claimed to own the lot adjoining, fenced the whole lots in. Said Roller also introduced evidence respecting the condition of the lots, at an early date, that they were gradually coming into value by the recent growth of the city. He also undertook to show that certain records pertaining to the tax sale had been lost. Other witnesses testified in behalf of said Roller (Rec., pp. 40 to 72), among whom was Return J. Meigs, clerk of the said court (Rec., p. 50), who showed conclusively that no such records had been lost or destroyed.

The case came on for hearing, and on May 5, 1898

(Rec., p. 90), upon the answers of all the parties and their proof, the late Mr. Justice Cox ordered the bill dismissed as to Roller, on the grounds that the Court had no jurisdiction over him. By said decree the cause was reserved for further proceedings between the other parties. On May 6, 1896, the said Court, Mr. Justice Cox (Rec., p. 90), passed a further decree directing partition of the property, and appointed Victor Anderson, John A. Butler, George Henderson, and Charles P. Stone, Commissioners to make partition.

By said decree the interest of the parties was specifically set forth, and the Commissioners were directed to make partition in accordance therewith.

On May 21, 1896, the appellee, Roller, entered an appeal from the decree in the case to the Court of Appeals. On May 20, the said Roller, obtained leave of Court to make a deposit of $100 in lieu of a bond as security for cost in the appeal (R., p. 92).

On May 29, 1896, said Commissioners, excepting said Stone, filed their report, setting forth that they had made partition of the land, so far as it was possible, by setting off the interest of the heirs of James Ward Scott in kind. That they had placed a money value upon all the several parts of the land and that they found it impractical to divide the land among the others, excepting that owned by the heirs of said James Ward Scott, without loss and injury to them. The plat (Rec., p. 96), shows how said land was proposed to be divided and the part set off to the heirs of said Scott.

On June 30, 1896 (Rec., 98), the report of said Commissioners was duly confirmed by Mr. Justice Cox, holding an Equity Court. And by said decree it was provided that the remainder of the land should be sold for

the purpose of partition among the parties to the cause, excepting said Roller, and the heirs of said James Ward Scott; and Leo Simmons was appointed trustee to make such sale. On October 24, 1898, the said Roller not having prosecuted his appeal, on motion of the complainants it was ordered that the appeal entered by said Roller, be dismissed (Rec., p. 99).

On June, 1901, the said Leo Simmons, trustee in said cause (Rec., p. 93), caused said property to be advertised for sale by public auction.

And on the 26th of July, 1901, the said Roller again filed a petition praying (Rec., p.100), 1st (Rec., p. 102), that he might have leave to intervene; 2nd, that he might have process against the parties; 3d, that he might have leave to introduce evidence; 4th, that a decree be passed annulling and avoiding all proceedings subsequent to May 5, 1896. On the same day said Roller filed his petition (Rec., p. 104) a rule to show cause was issued, requiring the parties to show cause on the 9th day of September, 1901, why the prayers of said Roller should not be granted, and the trustee was directed to withhold the sale of the property until the hearing (Rec., p. 104).

On September 9, 1901, the appellant, Clark, filed his answer to the rule to show cause (Rec., p. 105) setting forth the proceedings and denying Roller's right to further intervene in the case. And with this answer, said Clark, filed a certificate of title, by the Real Estate Title Insurance Co. (Rec., p. 107) showing the condition of the title to the lot at the time (see Rec., pp. 108, 109). And on said date, September 9, 1901, the said trustee, Leo Simmons, in response to the rule to show cause, filed an answer (Rec., pp. 109, 110) setting forth the reason why

the sale of the property had been delayed; that it was impossible for him to sell the property on account of being harrassed, etc. by the appellee, Roller, and that said Roller, representing the heirs of James Ward Scott, as attorney and wished to prevent competition at the sale, etc.

On November 6, 1901 (Rec., p. 110) the case came on to be heard upon the petition and rule to show cause, and thereupon the prayers of the petition was denied, the petition dismissed and the rule to show cause discharged; and thereupon said Roller, entered a second appeal to the Court of Appeals (Rec., p. 111). And on said appeal, the Court of Appeals reversed the decree of November 6, 1901 (Rec., p. 111) and remanded the case for further proceedings not inconsistent with the opinion (Rec., pp. 111, 112). The case being in the lower Court again, on November 27, 1903 (Rec., p. 112), the other parties to the cause filed in said Court a statement (Rec., pp. 112, 113) setting forth that it was impractical to comply with the decree of the Court of Appeals, for the reason that they were then in possession of the property and could not bring an action of ejectment.

On January 6, 1904, in obedience to the order of the Court of Appeals (Rec., p. 113), the said Supreme Court of the District of Columbia, passed a further decree, setting forth that the parties had elected to stand upon the proceedings, orderd, that the bill of complaint be dismissed and that cost in the case be awarded to said Roller. From this decree, which was directly at variance with the decree passed by Justice Cox eight years previous, the complainants and the defendants, Bartow L. Walker, appealed to the Court of Appeals (Rec., p. 113).

The appeal being entered in the Court of Appeals, the said Roller, thereupon moved the Court to strike from the transcript of the record certain portions, which he claimed had not been included in the record in the former appeal (Rec., pp. 116, 117). Thereupon, without hearing the case, the Court of Appeal on the 24th day of May, 1904, granted the motion to strike out, and on the same date, affirmed the decree below (Rec., pp. 119, 120) from which decree an appeal was taken to this Court (Rec., p. 120).

Assignment of Errors.

First. The Court of Appeals erred in entertaining the appeal of the appellee from the decree passed by the Supreme Court of the District of Columbia, on November 6th, 1901 (Rec., p. 110).

Second. The Court of Appeals erred in passing the decree of February 20th, 1903, whereby the decree of the Supreme Court of the District of Columbia (Rec., p. 110) was reversed, and the cause remanded for further proceeding (Rec., pp. 111-112).

Third. The Supreme Court of the District of Columbia erred in dismissing the bill and passing the decree of January 6th, 1904 (Rec., p. 113).

Fourth. The Court of Appeals erred in passing the decree affirming the decree of the Supreme Court of the District of Columbia, passed January 6th, 1904 (Rec., p. 113), and in not reversing the said decree; and further erred in striking out part of said record by its decree on motion of the appellee (Rec., pp. 119-120).

ARGUMENT.

The Court of Appeals had no jurisdiction to entertain the appeal of the appellee, John E. Roller, from the decree of the Supreme Court of the District of Columbia, passed November 6th, 1901 (Rec., pp. 110-111).

It will be seen by the record that the original decree in the case was passed May 5th, 1896, dismissing the bill as to Roller. And on May 6th, of the same year, a decree was passed for partition of the property.

That on June 30th, 1896, a final decree was passed confirming the partition made by commissioners appointed and appointing a trustee to sell the remainder of the property (Rec., p. 98.) The decree of May 5th and June 30th, 1896, the first dismissing the bill as to Roller and the second confirming the commissioner's report in partition, were final.

It cannot be said that a decree of May 5th, 1896, dismissing the bill as to Roller was not a final decree as to him. He appealed from said decree on May 21st, 1896, (Rec., p. 92,) at which time the decree confirming the commissioners' report in partition had not been passed, (see decree of June 30th, 1896, Rec., p. 98). Roller's appeal was dismissed on October 24th, 1898, (Rec. p. 99). At the time the order dismissing the appeal was passed Roller had not prosecuted his appeal, although more than two years had elapsed and the rules of practice of the Court of Appeals only allowed him forty days in which to complete his appeal. At the time he took the appeal from the order denying his second motion to intervene (Rec., p. 110,) five years had elapsed.

There need be no authorities cited to this Court to sus-

tain the proposition that a decree dismissing one party from a suit is a final decree.

As to the decree of June 30th, 1896, confirming the report of the commissioners in partition and whether or not the same was final, see—

Washington, etc., vs. Mayor, 2 Wall., 575.
Dean vs. Nelson, 7 Wall., 342.
Bk. of Louisburg vs. Sheffey, 140 U. S., 445.
Willard vs. Willard, 145 U. S., 116.

NOTE.—The last-named case was an appeal from the Supreme Court of the District of Columbia, in general term, ordering partition of by sale of certain real estate situate in the District of Columbia.

See also Mackall vs. Welloby, 6thA pp. D. C., 125; and same case in 167 U. S., 681.
See also St. Louis Etc., Co. vs. Southern Express Co., 108 U. S., 24.
Winthrop vs. Meeker, 109 U. S., 180.
Exparte Norton, 108 U. S., 237.

And on this subject it may be well to state that the decree of June 30th, confirming the commissioner's report (Rec., p. 98) was made final by the Act of Maryland, 1785, Chapter 73, Sec. 13; which provides that such decree shall pass title and have the effect of a deed. (See Abbert's Compilation, p. 85, Sec. 34.)

The cases cited in the opinion by the Court of Appeals to the contrary, namely, Perkins vs. Fourniquet, 6 How., 206; Fourniquet vs. Ewing, 16 How., 82, and Iowa vs. Illinois, 151 U. S., 238, do not seem to militate against the proposition that the decree of June 30, 1896, in this

case was final. In the first case the holding of the Court was merely that a reference to a master subject to the approval by the Court of the master's report was not final, whereas in this case the report of the commissioners was actually made and ratified. In the second case the order was that the complainants were entitled to two-sevenths of certain property and a reference was made to a master to take and report an account of it, reserving all other matters in controversy, and this was held not final, whereas in the present case the commissioners authorized to make a division reported, and their report was ratified and adopted. And in the third case, the decree appealed from directed a report of commissioners, who reported only as to a portion of the subject-matter referred, and it was held that a confirmation of this report as to such portion was not final, inasmuch as it did not cover the whole subject; whereas in the case at bar the report of the commissioners, which was approved, did cover the whole subject. In the case at bar, not only were commissioners appointed to make a division, but they actually made and reported such division, and their report was finally ratified, namely, on June 30, 1896. It would seem clear that this was a final decree, and that as the time for appeal from that decree had long since expired before the filing of the petition, which is the subject of present consideration, the appellee could not possibly have any standing in court.

It cannot be said that the Supreme Court of the District of Columbia did not have jurisdiction to entertain the suit for partitions. The title of the plaintiffs to the bill were fully admitted by Roller's answer and his only claim of title was under a mere void tax deed,

which the Court found to be the case. He had denied his tax title distinctly in a former proceeding (see Rec., pp. 67 and 68) where the case of Carruthers vs. Smith, Law No. 27147 of the Supreme Court of the District of Columbia, was pending involving title to these same lots. In answering the writ of *scire facias* the said Roller used the following words:

> "*That, moreover, the legal title to said lots never was in the said Irving, nor in the persons in whose names the lots were assessed and sold for taxes, but was in the heirs-at-law of Thomas Beall, deceased, who was the survivor of himself and John Mackall, the trustees of the original proprietors of the District of Columbia, and these heirs have conveyed said title to this respondent by deed dated the first day of March, 1889, and recorded in the land records of this District, in Liber No. 1548, folio 481, et seq.*
>
> "Having answered, he prays to be hence dismissed with his costs.
>
> JOHN E. ROLLER."

It is well settled, says the Court of Appeals in citing many authorities, that the mere averment of adverse title by the defendant in a partition suit is not sufficient to suspend the proceeding, but it was within the power of the Court to ascertain if the existing outstanding legal title claimed was sufficient to constitute a sufficient defense in an action of ejectment.

That is just what the Court that passed the decree of June 30th, did in this case. All of the parties were before the Court and not only had the title of the tenants in common been established, but Roller by his own answer and own statements had admitted that they had title, he

had none. See Roller's testimony as to his title (Rec., p. 39; Rec., p. 61). The defendants were in actual possession of the property; see Walker's deposition (Rec., p. 16, see p. 22). Such being the case, the Court of Appeals had no jurisdiction whatever to entertain the appeal of John E. Roller from the decree of November 6th, 1901, or the former decrees passed in the case.

The second attempt of Roller to get into the case was nothing more than a motion for rehearing, which was not subject to an appeal. Investment Co. vs. Sydnor, 19th App., D. C., 87. This ruling of the Court of Appeals is wholly inconsistant with any other case it has passed upon.

District vs. Humphries, 11th App., D. C., 68.
Chisholm vs. Cissell, 12th App., D. C., 180.

The order of May 5th, 1896, dismissing Roller was either final or interlocutory. If final, certainly it was incumbent upon him to complete his appeal in forty days. If not final, it was necessary to ask for the allowance of a special appeal. The Court of Appeals in the case of National Marble Co. vs. Railroad Co., 8th Appeals, D. C., 487, held that an application for the allowance of an appeal, made thirty days after the interlocutory order was passed came too late.

If the decree dismissing the bill as to John E. Roller on June 5th, 1896 (Rec., p. 99), was not final, how can it be said, that the decree of November 6th, 1901, dismissing his second petition for intervention (Rec., p. 110), was final? Certainly if he could not appeal from the first decree, for want of finality, he could not appeal from the second, for the same reason.

How can it be said that a person claiming an entire title to real estate and having no interest in the proceedings, he not being a party thereto and not being affected thereby, can intervene in a suit and stop other persons from litigating and setting their disputes about the same. If Roller was not in possession, his remedy was clearly at law, by action of ejectment. If he was in possession, his remedy was, if he had title, by adverse possession, (*which he did not claim*), by bill to quiet title.

It is a well settled principle of law that no man has a right to intervene in a case which does not concern him, and which could not affect him in any way by any decree passed in the case. Is a denial of the right to intervene in such a case appealable?

We contend that the merits of the case was closed when Roller was dismissed in 1896.

The Court's attention is specially called to the fact that Roller had admitted the title of the parties. Besides his tax title he set up title under deed from Thoma Beale, trustee to whom the legal title were conveyed by the original proprietors to lay off the City of Washington, but he afterwards abandoned that claim altogether. See stipulation of Roller (Rec., p. 29).

The appellee Roller, having taken an appeal from the decree dismissing the bill as to him and having failed to prosecute same and such appeal being dismissed (Rec., p. 99), he was out of Court for all purposes and had no right to intervene a second time in the case. It may be said on behalf of the appellee that the decree passed upon Roller's first demurrer, dismissing the first bill as to him, was a bar to any other suit (Rec., p. 79). But it will be plainly seen by said decree that the bill was only dismissed as to said Roller; the Court evidently intending

that the remaining parties should continue, if they should so desire.

Instead of doing so however, they saw fit to enter a voluntary dismissal of that bill (Rec., p, 78), and began a new proceeding (Rec., p. 2).

The tax deed set up by Roller was absolutely void, and he did not show any title by adverse possession ; therefore the Supreme Court of the District of Columbia, Mr. Justice Cox, would have been justified in passing a final decree against him, declaring the tax deed, under which he claimed (Rec., p. 30), void and removing the same as a cloud upon the title of the other parties.

King *vs.* D. C., McA. and Mackey, 36.
Wash. *vs.* Pratt, 8 Wheat., 681.
French *vs.* Edwards, 13 Wall., 506.

His claim as to loss of records was not proven, and even if it had been it would have not have changed the situation.

Mason *vs.* Fearson, 9 How., 248.
Walker *vs.* D, C., 6 Mackey, 352.

The said tax deed was void upon its face and without proof of adverse possession for the full period of twenty years, as then required, it was not evidence of any title whatever, and could not be admitted for any purpose.

Sharon *vs.* Tucker, 144 U. S., 533.

It may be well to state that the reason why the deed is void on its face is : 1st, because the tax collector instead of selling each lot separately, as the law required, sold them in a lot.

Washington *vs.* Pratt, 8 Wheat., 681.

And second, because the tax collector did not certify the record of the sale to the recorder of deeds, as required by law.

King vs. District of Columbia, 2 McA. and M., 36.
Keefe vs. Bramhall, 3 Mackey, D. C., 551.
Reade vs. Anderson, 13 App., D. C., 30.

The decree of the Court of Appeals affirming the decree below whereby the bill of complaint was dismissed, should be reversed and the case remanded to the Supreme Court of the District of Columbia, with directions to vacate the decree of January 6th, 1904 (Rec., p. 113).

Respectfully submitted,

Leo Simmons,

Attorney for Appellants.